UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH

NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS APPRENTICESHIP, JOURNEYMAN RETRAINING, EDUCATIONAL, AND INDUSTRY FUND

and

Case No. 02-CA-121358
Case No. 02-CA-121477

DENNIS A. BROWN, an Individual

and

RICHARD SATURNO, an Individual

Rebecca A. Leaf, Esq.,
for the General Counsel.
G. Peter Clark, Esq.,
for the Respondent.
Bernard Mason, Esq.,
for the Charging Parties.

DECISION

STATEMENT OF THE CASE

Lauren Esposito, Administrative Law Judge. Based upon a charges in Case 02–CA–121358 and 02-CA-121477, filed on January 28, 2014, and January 29, 2014, by Dennis A. Brown and Richard Saturno, respectively, a complaint and notice of hearing issued on April 30, 2014. The complaint alleges that New York City District Council of Carpenters Apprenticeship, Journeyman, Retraining, Educational, and Industry Fund ("Respondent") violated Section 8(a)(1) of the Act by denying Brown and Saturno teaching assignments to the shop and field sections of an upcoming grants program training course entitled Building Works, in retaliation for their protected concerted activities. This case was tried before me on September 22–24, 2014, and on October 6, 2014, in New York, New York.

After the conclusion of the trial, the parties filed briefs, which I have read and considered. Base on those briefs, and the entire record in the case, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Taft-Hartley jointly administered benefit fund with offices and a place of business in New York, New York. I find, as Respondent admits, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent operates a Labor Technical College which administers training programs, including an apprenticeship program and a preapprenticeship program known as Building Works which has employed the Charging Parties as instructors. Elly Spicer is the director of training for the Labor Technical College, including both the apprenticeship program and Building Works. Donald Killinger was the director of preapprenticeship training programs and grants manager for approximately 10 years, until September 19, 2013. On August 5, 2013, Joan Staunton became director of preapprenticeship training programs and grants manager, and shadowed Killinger until his tenure ended. During this period of overlap, Killinger familiarized Staunton with Building Works and the program's instructors (Tr. 338). The director of preapprenticeship training programs and grants manager reports to Spicer. Suzanne McNamara has been the assistant grants manager for Building Works since 1998, and now reports to Staunton. Respondent admits and I find that Killinger, Staunton, and McNamara are supervisors within the meaning of Section 2(11) of the Act.

The instant case involves instructors in Respondent's Building Works program. Building Works is a preapprenticeship training program to teach carpentry and building trades skills to individuals in economically disadvantaged communities, who can then be placed in jobs in the building trades, optimally within a union apprenticeship program (Tr. 231). There is a significant application process for candidates, including what the parties refer to as a "Tryout" where the candidates are evaluated by instructors as they perform practical activities. The Building Works program itself consists of a 3 to 4 month training cycle followed by job placement and follow-up with former students who enter apprenticeship programs (Tr. 231–232). There are typically between 2 and 4 Building Works programs, or cycles, each year (Tr. 31). Each Building Works cycle includes a shop class and a field class. The shop class takes place at Respondent's 345 Hudson Street location, and involves training in tool use, manipulation, and recognition, shop safety, blueprint reading, measuring, and bench work (Tr. 34). The field class permits the students to use skills acquired during the shop class as they perform work at an actual building site, usually associated with a not-for-profit concern[1] (Tr. 34). The shop portion of the Building Works program lasts for approximately 2 weeks, and the field portion lasts for approximately 3

[1] Other classes comprising a typical Building Works cycle include math/literacy, asbestos, blueprint reading, and health and safety. GC Exh. 5; Tr. 37.

weeks (GC Exh. 5). Staunton manages a staff of Building Works program coordinators, including McNamara, Lisa Bethea, and Everett Kilgo (Tr. 275).

The Charging Parties, Dennis Brown and Richard Saturno, have worked as instructors in the Building Works program for a number of years. Brown began working for Respondent on February 14, 2001, and has taught in both the Building Works and apprenticeship programs (Tr. 30). Saturno has been an instructor with the Building Works program since 1974, and began teaching shop and field classes in 2000 (Tr. 181–182). Brown and Saturno both testified that they typically taught the shop and field portions of a Building Works cycle together, for cycles situated in both New York and New Jersey (Tr. 38; GC Exhs. 7, 8, 22, 23, 27). Occasionally, if there were New York and New Jersey cycles occurring simultaneously, a third instructor would be brought in to assist them with the shop and field classes (Tr. 38–39). In 2011 and 2012, the third instructor assigned to shop and field classes with Brown and Saturno was Nestor Gonzalez (Tr. 114). Brown and Saturno also evaluated the Building Works participants, and prepared written grades which were then provided to the program coordinators[2] (Tr. 60–61, 64–66; GC Exhs. 10–13). Brown and Saturno selected the top three Building Works participants for awards as well (Tr. 66; GC Exhs. 11–13).

In addition to the actual instruction of participants in the Building Works shop and field classes, Brown and Saturno sought out and selected the job sites for Building Works field classes. Brown testified that this involved locating not-for-profit building sites through his own business contacts, making appointments, and visiting the job sites to determine whether they would be appropriate for a field class (Tr. 72–74, 192–193; GC Exh. 14). Brown and Saturno then prepared lists of supplies and materials necessary for the field class to actually perform work at the jobsite, once selected (Tr. 77–80, 83–84; GC Exhs. 15, 16). Brown testified that, to the best of his knowledge, either he or Saturno had "scoped" almost every jobsite for the Building Works field classes within the past 5 years in this manner (Tr. 74).

Brown and Saturno considered themselves the lead instructors for the Building Works shop and field classes, and referred to themselves in this manner in their interactions with Respondent[3] (Tr. 56–57, 193–194; GC Exh. 12). Although Respondent's witnesses denied the existence of a "lead instructor" job classification, there is no evidence that Respondent disabused Brown and Saturno of the idea that they functioned in such a manner (Tr. 320–321, 352).

Brown and Saturno also worked as instructors on Tryouts, where candidates for upcoming Building Works cycles participate in activities designed to test their aptitude for mathematics and spatial relations, measurement concepts, verbal communication, and interpersonal interaction (Tr. 87–92, 186–189). Brown, Saturno, and the program managers who also worked at the Tryouts then evaluated the candidates for potential placement in the Building Works program (Tr. 216–217). Brown and Saturno both testified, without contradiction, that every time they had worked as instructors during a Tryout, they had also worked as shop and field instructors during the ensuing Building Works cycle (Tr. 98, 190).

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[2] Brown established the scale for grading participants in the Building Works program (Tr. 61–62). If a third instructor had taught the shop and field classes, they would participate in the grading as well (Tr. 61, 65–66; GC Exh. 11).

[3] For example, in a February 5, 2013 email to Higbee submitting the student grades and rankings for an earlier New Jersey Building Works cycle, Brown stated that "Richie [Saturno] and I have been the primary instructors, and have spent the most time with the students" (GC Exh. 12).

2. The October 23, 2013 Conversation between Brown, Saturno, and Staunton

On October 23, 2013, Brown and Saturno had come to the employer's facility in order to perform an inventory of the tools they would need for an upcoming New York Building Works shop class, when Staunton asked them to meet with her in her office (Tr. 102, 199, 243–244). After Brown and Saturno arrived, Staunton asked them to prepare written lesson plans for the New York Building Works shop class. Brown said that they already had a general outline, but Staunton said that she wanted a day-to-day description of the class containing more specific information (Tr. 102, 199, 245–246). Brown told Staunton that they would not have time to prepare a detailed description of the shop class that day, and Staunton asked that they send it to her later (Tr. 102). Brown also asked Staunton for a copy of the upcoming class schedule, and she said she would send it to both of them (Tr. 365–366).

At that point, the testimony regarding this meeting diverges. According to Brown and Saturno, Saturno then told Staunton that he and Brown had ongoing concerns about the terms and conditions of their employment. According to Brown and Saturno, Saturno said that he and Brown did not have a work agreement, and did not know their benefits, work hours, or the time frame for receiving their pay (Tr. 102, 199). Saturno testified that he also inquired about their official title and overtime pay, and asked Staunton why they were not receiving the same pay rate as full-time instructors (Tr. 200). According to Brown and Saturno, Saturno also told Staunton that the Labor Wage Theft Prevention Act, enacted in 2010, required that Respondent provide them with a yearly statement describing their benefits and pay, but they had never received one[4] (Tr. 102–103, 199). Saturno testified that he also told Staunton that he had received a letter from Retirement Fund Manager Brian Spencer mentioning an agreement that applied to their employment, which he and Brown had never seen[5] (Tr. 200, 212–215; R.S. Exh. 7). Saturno and Brown testified that after Saturno initially raised these issues, Brown said that he needed to leave to use the restroom, and Saturno said that they should wait until Brown returned in order to continue the discussion (Tr. 362–364, 386–388). Saturno testified that while Brown was in the restroom, Staunton reviewed some papers and made notes (Tr. 387).

According to Brown and Saturno, after Brown returned from the restroom the meeting continued for another ten minutes or so, and they discussed the questions Saturno had raised (Tr. 363–364). Staunton told Brown and Saturno, "your jobs are going to be phased out eventually" (Tr. 103). Staunton then told Saturno that he had made "a lot of complaints" or "had asked questions before," and was "being watched carefully" (Tr. 103, 200). However, Staunton said that she would "discretely inquire" as to whether a work agreement or the LWTPA notice existed, and provide them with copies[6] (Tr. 103, 200–201). The meeting then ended, and Brown and Saturno left in order to do inventory (Tr. 364, 387).

[4] Brown and Saturno testified that they received a LWTPA notice for the first time in February 2014 (Tr. 103, 368–369; GC Exh. 26).

[5] This October 15 letter to Saturno from Spencer states that it responds to Saturno's inquiry regarding hours reported to the Pension Fund on his behalf. The letter further states that "prior to January 1, 2011, Participation Agreement did not exist which required your Employer to contribute to the Pension Fund," but that contributions had been made on his behalf since that time (R.S. Exh. 7).

[6] Saturno testified that the next week he saw Staunton at a job site in Gerritsen Beach, Brooklyn, and asked her whether she had any information about the questions he and Brown had raised during their meeting. Staunton replied that she was preparing a letter, but Saturno never received one (Tr. 201).

Staunton testified that she could not recall any mention of overtime pay, the Labor Wage Theft Prevention Act, Saturno's being watched, or Brown and Saturno's jobs being phased out during this conversation (Tr. 250–252). Staunton testified that Brown and Saturno asked her to let them know as soon as possible if there were any future Building Works cycles for which they would be scheduled, and she said that she would attempt to do so (Tr. 247). According to Staunton, Brown and Saturno then stated that they were unclear as to their job title and job description, and Staunton said that she would look into that for them (Tr. 247–248). Staunton testified that Brown then left to begin taking inventory,[7] but Saturno stayed behind, and showed her the letter he had received from the Pension Fund (Tr. 248). Staunton said that she had seen the letter, and Saturno appeared "very upset" about it (Tr. 248). Staunton explained that she had been sent a copy as a courtesy, as the director of Building Works, and that it was not a big deal (Tr. 248–249). Saturno asked about the participation agreement referred to in the letter, and Staunton said that she was not familiar with it, directing Saturno to the benefits department (Tr. 249). Saturno then became agitated, saying that he did not want to ask too many questions or get in trouble and get fired like Nestor [Gonzalez] (Tr. 249). Staunton assured him that that would not happen, because Saturno was only asking questions (Tr. 249).

Later in the afternoon, Staunton sent Brown and Saturno an email containing the class schedule for the New York Building Works cycle taking place in November and December (Tr. 101, 198–199, 365; GC Exh. 20). In addition, Staunton provided possible dates for the shop and field classes for the next Newark Building Works cycle, in December and January, emphasizing that the Newark dates were tentative (.C Exh. 20).

3. Other discussions regarding instructor wages and benefits

Brown and Saturno testified regarding several other conversations with Respondent's managers involving inquiries and complaints about the instructors' terms and conditions of employment. Brown and Saturno testified that in early October 2012 they had a conversation with Assistant Grants Manager Suzanne McNamara regarding the employment of Nestor Gonzalez, who had worked with Brown and Saturno as the third instructor for the Building Works field class. Brown and Saturno testified that McNamara called them out of their classroom while they were teaching at a Tryout (Tr. 115, 204–205). McNamara told them that they were only authorized to bill Respondent for 7 ½ hours of work per day during the upcoming field class, and were not authorized to bill for overtime. According to Brown and Saturno, Brown then asked McNamara for permission to contact Gonzalez, because the field class would require a third instructor given its size (Tr. 115, 205). McNamara responded that Gonzalez would not be working for Respondent in the future, because he had made "too many complaints about his pension and benefit hours," and "ruffled feathers" (Tr. 115, 205). McNamara stated that Director of Training Elly Spicer had "had it with him" as a result (Tr. 115–116).

McNamara testified that she recalled telling Brown and Saturno that they were authorized to bill Respondent for 7 ½ hours of work per day during this conversation (Tr. 354).[8] However, she testified that she could not recall Brown or Saturno saying anything, and denied making any statement regarding Nestor Gonzalez (Tr. 355–356). Spicer also denied ever telling

[7] In surrebuttal testimony, Staunton stated that she could not recall Brown leaving to use the restroom during the conversation (Tr. 395–396).

[8] She also testified that she told Brown and Saturno that changes would probably take place in their employment, because Spicer was interested in using full-time instructors for the Building Works program (Tr. 354).

McNamara, or anyone else, that Gonzalez had made too many complaints regarding his pension and benefits hours (Tr. 343–344).

Brown also testified regarding a conversation with Donald Killinger, who was then grants manager, about Saturno's complaints pertaining to wages and benefits hours during the winter of 2012 (Tr. 116–117). Brown testified that he had called Killinger to ask whether another employee could notarize some documents during the lunch hour, and Killinger instead asked Brown to come to his office (Tr. 116). Killinger asked Brown, "Does [Saturno] have anything against me?" and Brown responded that Saturno was "just unhappy with the way things are going" (Tr. 117). According to Brown, Killinger said that he had heard from Spicer and "from upstairs" that Saturno had been "making too many complaints about…wages and hours and benefits," to the benefit fund in particular. (Tr. 117–118). Killinger said that Saturno's complaints were "making it very uncomfortable for me and for the Labor Technical College," and that Spicer had said that it was "not a healthy situation" (Tr. 118). Brown responded that Saturno wanted "parity" with any other union carpenter, and wanted "the same benefits and hours and rate of pay that we were promised" (Tr. 118).

Killinger testified that he recalled this conversation with Brown, which he initiated in order to discuss Saturno. According to Killinger, "there were a number of incidents where I felt like I was under direct attack by [Saturno] for things that I allegedly had said, or done, or ways that he had interpreted things that I had said and done" (Tr. 328). Killinger testified that he was "confused by the nature of [Saturno's] accusations," and "was taking personal offense" (Tr. 328). Killinger stated that he wanted to ask Brown about Saturno, and "why these things kept coming at me" (Tr. 328–329). Killinger testified that, "I certainly can't directly quote anything from that conversation," but that Brown stated "something along the lines" that he didn't really know what was going on and would be "on the lookout" (Tr. 329). Killinger stated that he could not recall telling Brown that Saturno was making too many complaints, or that Spicer had said that it was "not a healthy situation" (Tr. 331–332). Spicer also denied making these statements to Killinger (Tr. 344–345).

Finally, Saturno testified regarding an earlier conversation between Killinger and Nestor Gonzalez pertaining to pension credits. According to Saturno, in May 2011 the instructors received a wage increase retroactive to January 1, with annuity and pension contributions, and in June 2011 Gonzalez was informed that he would be losing his pension because he was working for the District Council of Carpenters (Tr. 203). Saturno and Gonzalez subsequently asked Spencer whether they were receiving pension credits, and Spencer said no (Tr. 203). Saturno testified that shortly after he and Gonzalez returned to the shop, Killinger came in and yelled at Gonzalez, telling him that if he had questions regarding his compensation he needed to "follow the chain-of-command" (Tr. 203–204). Killinger testified that he had no recollection of this specific conversation, but stated that he never "angrily confronted" the instructors (Tr. 324–325).

4. The 2013 tryouts and New Jersey Building Works pogram

By email dated October 18, 2013,[9] Brown and Saturno learned from Lisa Bethea that they would be teaching at the Tryout for the upcoming New Jersey Building Works program (Tr. 87; GC Exh. 17). The tryout took place on October 24 and 25 (Tr. 87, 255–256; GC Exh. 17). Brown ran the Ladder Relay station on the first day (Tr. 88, 90–91). On the second day, Brown and Saturno ran the measurement program, including the village exercise, a cooperative role-

[9] All subsequent dates are in 2013 unless otherwise indicated.

playing exercise involving measurement (Tr. 89; GC Exh. 17). On October 23, Staunton sent Brown and Saturno the email described previously, which contained the tentative dates for the New Jersey Building Works cycle[10] (GC Exh. 20). On October 25, Staunton sent the instructors and program directors, including Brown and Saturno, a list of 15 candidates that had been selected for the New Jersey Building Works cycle based upon their participation in the Tryout (GC Exh. 18). Staunton stated in this email, "Thanks again for your help in the selection process. We look forward to another successful class!"

As stated previously, Brown and Saturno had always been assigned the shop and field classes for a Building Works cycle after they had taught the preceding Tryout. Based upon this experience, they assumed they would be teaching the shop and field classes in the New Jersey Building Works program tentatively scheduled for December 2013 and January 2014. However, on December 13, Staunton sent Brown an email informing him that he would not be teaching the shop class in the upcoming New Jersey Building Works program (Tr. 107–108; GC Exh. 21). Brown responded on December 15, asking whether he would be teaching the field class in the program, and indicating that he was available (GC Exh. 21). Staunton replied the next day that Brown would not be teaching the field portion of the program either (GC Exh. 21). On December 12, Saturno wrote to Staunton as well, asking whether he would be teaching the field class for the New Jersey program. The next day, Staunton forwarded Saturno's email to McNamara, with a draft response to Saturno telling him that he would not be needed for the upcoming New Jersey shop class (GC Exh. 24). An hour and a half later, Staunton sent Saturno a similar email to the one she had sent McNamara, informing him that he would not be teaching (R.S. Exh. 13).

Brown and Saturno then spoke to Staunton regarding the New Jersey Building Works program on December 20, at the completion of the New York program in Brooklyn. Brown and Saturno testified that when Staunton approached them, Saturno asked, 'Is this our swan song?" (Tr. 108, 197–198). Staunton replied, "we'll call you when we need you" (Tr. 108, 198). Saturno said that he was not happy about not having been assigned the New Jersey program, but Staunton just shrugged (Tr. 108). Staunton testified that when she saw Brown and Saturno they discussed the performance of the students in the New York program, and then asked why they had been fired (Tr. 269–270). Staunton testified that she told Brown and Saturno that they had not been fired, and that she would call them the next time they were needed (Tr. 270). According to Staunton, Brown and Saturno then asked whether Spicer planned to continue using full time as opposed to part-time instructors for the Building Works programs, and Staunton responded that she understood that to be the plan moving forward[11] (Tr. 271).

Brown and Saturno were never informed why Respondent did not assign them to teach the shop and field classes during the New Jersey Building Works cycle in December 2013 and January 2014 (Tr. 110, 197). Instead of Brown and Saturno, Staunton assigned two other part-time instructors, Steve Levisay and Steve Russo, to teach the shop and field classes.

[10] Brown testified that the director or one of the program coordinators would usually provide the instructors with a schedule for a particular cycle prior to its inception (Tr. 366–368).

[11] On rebuttal, Brown and Saturno denied discussing the use of full-time staff for the Building Works shop and field classes during this conversation (Tr. 373–374, 389).

B. Discussion and Analysis

1. Applicable legal standards and contentions of the parties

Under Section 8(a)(1) of the Act, an employer may not "interfere with, restrain or coerce employees in the exercise of the rights guaranteed" by Section 7. In order to determine whether an adverse employment action was unlawfully motivated, the Board utilizes the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish unlawful conduct under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in the employer's decision. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143 at p. 3–4 (2011). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 at p. 3 (2014); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 at 1089; *Mesker Door*, 357 NLRB No. 59, at p. 2 (2011); *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006). Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the employee's protected activity. *T&J Trucking Co.*, 316 NLRB 771 (1995), enf'd, 86 F.3d 1146 (1st Cir. 1996); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996), enf'd, --- Fed.Appx. ----, 127 F.3d 34 (5th Cir. 1997).

Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services,* 343 NLRB 1183 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Ronin Shipbuilding*, 330 NLRB 464 (2000). It is well-settled that adverse action occuring shortly after the employee has engaged in protected activity engenders an inference of unlawful motive. See *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003), citing *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). As part of its initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); see also *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007) (unlawful motivation demonstrated not only by direct evidence, but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action). Indeed, if the evidence establishes that the employer's asserted reasons are pretextual, "either false or not actually relied on," the employer "fails by definition to show" that it would have taken the same action despite the employee's protected activity. *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 at p. 3, citing *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

General Counsel contends that Respondent violated Section 8(a)(1) by refusing to assign Brown and Saturno to teach the shop and field classes in the December 2013-January 2014 New Jersey Building Works cycle in retaliation for their protected concerted activity. Respondent argues that Brown and Saturno did not engage in protected concerted activity, and that it selected Levisay and Russo to teach the shop and field classes in the New Jersey Building Works cycle, instead of Brown and Saturno, for legitimate, nondiscriminatory reasons.

2. Brown and Saturno engaged in protected concerted activity

The evidence establishes that Brown and Saturno engaged in protected concerted activity during their discussion with Staunton on October 23 and on other pertinent occasions. I credit Brown and Saturno's mutually corroborative testimony that Saturno told Staunton that he and Brown did not have an agreement applicable to their work, and were unclear as to their benefits and work hours. I further credit their testimony that Saturno protested Respondent's failure to provide them with an annual notice pursuant to the Labor Wage Theft Prevention Act, including information regarding their regular and overtime pay rates. It is well-settled that discussions involving wages, "probably the most critical element in employment," constitute protected activity and "the grist on which concerted activity feeds." *Parexel International, LLC*, 356 NLRB No. 82 at p. 3 (2011), quoting *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996); see also *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 at p. 4, fn. 10. The evidence therefore establishes that Brown and Saturno's statements to Staunton addressed their terms and conditions of employment, and were protected under Section 7.

I further find that Brown and Saturno's activity was concerted in nature. Brown and Saturno met with Staunton together on October 23, and the evidence establishes that they raised issues regarding wages and benefits which applied to both of them. Furthermore, when Saturno encountered Staunton at a jobsite in Gerritsen Beach 1 week later, Saturno asked her whether she had any information "about the questions that Dennis and I had" (Tr. 201). Such a sequence of events comprises an "ongoing collective dialogue" with Respondent's managers regarding Brown and Saturno's terms and conditions of employment. *Tampa Tribune*, 351 NLRB 1324, 1324–1325 (2007), enf. denied, 560 F.3d 181 (4th Cir. 2009). As a result, I find that Brown and Saturno raised their issues regarding wages and benefits in a concerted manner.

In reaching these conclusions, I credit the testimony of Brown and Saturno over the testimony of Staunton to the extent that they conflict. I note that Brown and Saturno, who chose not to remain in the hearing room during one another's testimony, both provided detailed testimony regarding the meeting with Staunton which was generally mutually corroborative. Respondent contends that Saturno spoke to Staunton regarding wages and benefits alone after Brown left the room, and only raised issues regarding his own compensation, such that his statements were not concerted in nature. However, on rebuttal Brown and Saturno offered mutually corroborative testimony to the effect that Brown left the meeting briefly to use the bathroom, and that Saturno and Staunton did not discuss the issues regarding wages and pension benefits until after he returned, when Saturno raised these concerns as applying to both of them. I find their testimony in this respect more probative than Staunton's statement on surrebuttal that she could not recall Brown's leaving the meeting to use the bathroom (Tr. 395–396). As a result, I find that Brown was present when Saturno questioned Staunton as to their wages, benefits, and other terms and conditions of employment.

In addition, the evidence does not support Respondent's argument that Brown and Saturno's activity was not concerted because Saturno was referring solely to his own pension fund contributions when showing Staunton Spencer's letter. I credit Saturno's testimony that he referred to the letter in order to question Staunton regarding the "Participation Agreement" it mentions requiring that Respondent contribute to the pension fund on Saturno's behalf, and that Saturno characterized the participation agreement as applying to both his and Brown's employment. The evidence also establishes that beginning in 2011 Respondent began making contributions to the annuity and pension funds not only on behalf of Saturno, but on behalf of

Brown and other instructors as well (Tr. 155–156, 203, 208–209). The evidence further demonstrates, as discussed in the following section, that Saturno and Nestor Gonzalez had been raising issues regarding pension and annuity fund contributions applicable to the part-time instructors for several years. Thus, I find that Saturno was showing Staunton Spencer's letter in order to confirm the existence of a participation agreement ostensibly applicable to both his and Brown's employment, and to question Staunton as to the agreement's terms.

Other testimony of Staunton's regarding the October 23 meeting also leads me to credit Brown and Saturno's version. For example, Staunton testified that Brown and Saturno told her they "were unclear about their job title and job description," and wanted more information "about what the expectations were for instructors" (Tr. 247–248). I find this testimony inherently implausible given that Brown and Saturno had worked as Building Works instructors for at least 13 years. Indeed, it is undisputed that prior to any discussion of Brown and Saturno's terms and conditions of employment, Staunton had asked them for a detailed description of the shop class they routinely taught together. It is therefore significantly more likely that, as Brown and Saturno testified, they told Staunton that they were unclear as to their wages, benefits, and other terms and conditions of employment, and whether their employment was covered by an agreement such as the participation agreement referred to in Spencer's letter.[12]

Evidence regarding events following the October 23 meeting also mitigates in favor of crediting Brown and Saturno's testimony regarding the meeting itself. Staunton testified that after the meeting she spoke to and emailed Respondent's director of human resources, Valerie Burett, in order to formulate a job description for the part-time instructors[13] (Tr. 254–255). However, her email to Burett describes Brown and Saturno's job functions in detail, as well as their hours, rate of pay, benefit contributions, and the manner in which Respondent addressed their claims for unemployment benefits (R.S. Exh. 11). The email is therefore more consonant with an inquiry as to the issues that Brown and Saturno claimed that they raised during the meeting than with a request to prepare a job description which for all intents and purposes is contained in the email itself. Brown and Saturno's account of the meeting is further supported by evidence establishing that Burett issued Labor Wage Theft Prevention Act notices which were sent to Brown and Saturno in early 2014 (GC Exh. 26; Tr. 368–369, 388–389). Indeed, Staunton testified that in May 2014, Burett contacted her to obtain Saturno's address, because Saturno had yet to return a signed copy of the LWTPA form (Tr. 398–399). All of this evidence supports the conclusion that during the October 23 meeting, Brown and Saturno inquired as to the LWTPA form and the information it contains—their regular and overtime pay rates and pay schedule—as opposed to their job descriptions, as Staunton contended.

For all of the foregoing reasons, the evidence establishes that Brown and Saturno were engaged in protected concerted activity during their October 23 meeting with Staunton.

3. Statements evincing animus

I find that the record contains sufficient evidence of animus on the part of Respondent toward Brown and Saturno's protected concerted activities to establish a prima facie case. In particular, I find that Staunton, McNamara, and Killinger all made statements evincing animus

[12] Even if, as Staunton testified, Brown and Saturno's questions had been limited to their job titles and descriptions, I would find that they were engaged in protected concerted activity during the October 23 meeting. See *Temecula Mechanical, Inc.*, 358 NLRB No. 137, at p. 5–6 (2012) (employees' contacts with the union regarding their wage rates and job duties protected).

[13] Burett did not testify.

against inquiries and complaints made by Brown, Saturno, and other instructors regarding their wages and benefits. I further find, as discussed in the subsequent section, that the timing of Respondent's refusal to assign Brown and Saturno the shop and field class in the 2013–2014 New Jersey Building Works cycle, as well as other factors, support a finding that Respondent's decision was unlawfully motivated.

As discussed previously, I generally credit Brown and Saturno's mutually corroborative testimony regarding their October 23 meeting with Staunton. I therefore credit their testimony that Staunton told them that Saturno had made "a lot of complaints" or "had asked questions before" and was "being watched carefully." The evidence establishes that Saturno had in fact "asked questions before," in that he had made inquiries with Spencer regarding his pension benefits. Killinger likewise testified, as discussed below, that Saturno had made "inquiries" regarding his working conditions (Tr. 339). As a result, the contextual evidence supports a credibility resolution in favor of Brown and Saturno with respect to the statements they attributed to Staunton during the October 23 meeting, which evince Respondent's displeasure with Saturno's having raised issues regarding his terms and conditions of employment.

I likewise credit Brown and Saturno's mutually corroborative testimony regarding McNamara's statements during an October 2012 conversation that Nestor Gonzalez would no longer be working for Respondent because he had "ruffled feathers" by making "too many complaints about his pension and benefit hours," so that Spicer had "had it with him." McNamara testified that she did not recall Brown or Saturno saying anything during this conversation, and otherwise denied making such statements (Tr. 354–355). Such denials are not as a general matter a compelling rebuttal to detailed testimony regarding the conversation. See, e.g., *Laser Tool, Inc.*, 320 NLRB 105, 109 (1995). In addition, I find it logical that Brown and Saturno would, as they both testified, ask whether they could contact Gonzalez to be a third field class instructor immediately after McNamara told them they were not authorized to bill for overtime. McNamara's rejoinder that Gonzalez had "ruffled feathers" by making "too many complaints about his pension and benefit hours," such that Spicer had "had it" with him, is consistent with Staunton's assertion that Saturno was "being watched carefully" because he had "made complaints" or "asked questions" in the past.

Finally, I credit Brown's testimony that during a conversation with Killinger in the winter of 2012, Killinger told him that he had heard from Spicer that Saturno had been "making too many complaints about…wages and hours and benefits," particularly to the benefit fund, which were "making it very uncomfortable for [Killinger] and for the Labor Technical College." Killinger testified that he could not recall any specific statements from this conversation, but admitted that he initiated it specifically to ask Brown about Saturno's "accusations." He also admitted that his contention that he did not tell Brown during their conversation that Saturno had made "complaints" was engendered by his own theoretical distinction between "complaints" and "inquiries"[14] (Tr. 329–330). Whether characterizing Saturno's statements as "complaints" or "inquiries," however, Killinger admitted that Saturno had raised issues with the benefit fund in particular, and that they involved his working conditions (Tr. 338–339).[15] Killinger was obviously

[14] Killinger's testimony in this regard echoes Respondent's statement of position submitted to the Region during the investigation of the charges, which argues that Brown and Saturno's activities were not concerted because they made "inquiries" as opposed to "complaints" about their terms and conditions of employment (GC Exh. 25, p. 7–9). This further undermines the probative value of Killinger's testimony.

[15] They thus constituted protected concerted activity. See *Air Contact Transportation, Inc.*, 340 NLRB 688 (2003), enfd., 403 F.3d 206 (4th Cir. 2005) (employee's posing questions during

quite upset regarding Saturno's activities, and freely admitted that he had approached Brown "to see if [Brown] had some sort of insight," resulting in, as Killinger testified, Brown's agreement "that he would just be on the lookout" where Saturno was concerned (Tr. 328–329). For all of the foregoing reasons, I credit Brown's account of this conversation.[16]

I further find that McNamara and Killinger's statements in October 2012 and the winter of that year are sufficiently connected with Brown and Saturno's statements to Staunton during their October 23, 2013 meeting to merit consideration in determining whether Respondent's failure to assign Brown and Staunton the shop and field classes in the 2013–2014 New Jersey Building Works cycle was unlawfully motivated. Although McNamara and Killinger's remarks took place 1 year and a number of months prior to the late fall of 2013, respectively, both conversations addressed the instructors' repeated questions and complaints regarding their wages and benefits. McNamara and Killinger also both expressed Respondent's dissatisfaction with Gonzalez and Saturno's activities, stating that they had "ruffled feathers" by making "too many complaints about his pension and benefit hours," causing a situation that was "very uncomfortable for [Killinger] and for the Labor Technical College," such that Spicer had "had it" with such conduct. These statements from 2012, which address the same conduct and one of the same instructors, Saturno, involved in the events of 2013, are thus pertinent to the existence of unlawful motive. See *Vision of Elk River, Inc.*, 359 NLRB No. 5, at p. 5–6 (2012), affd. 361 NLRB No. 155 (2014) (manager's 2007 statements evincing antiunion animus pertinent to his motivation in making 2009 layoffs, where union organizing campaign remained active).

For all of the foregoing reasons, I find that General Counsel has established a prima facie case that Brown and Saturno were not assigned to teach during the 2013–2014 New Jersey Building Works cycle in retaliation for their protected concerted activity.[17]

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meeting "on behalf of himself and other coworkers" protected).

[16] I credit Saturno's testimony that in 2011 he and Gonzalez questioned Spencer as to whether they were receiving pension credits, and that Killinger later asked Gonzalez to "follow the chain of command" with questions regarding compensation (Tr. 202–204). Killinger's denial regarding this incident was focused on whether his interactions with the instructors were hostile (Tr. 324–325). While this testimony further establishes Saturno and Gonzalez' history of raising issues related to the employment of the part-time instructors, Killinger's statement was focused on Gonzalez' having failed to inform him personally regarding his questions, as opposed to expressing dismay that Gonzalez was making inquiries in the first place. I therefore find that it is less probative in terms of evincing animus in connection with Respondent's failure to assign Brown and Saturno to teach the shop and field classes in New Jersey Building Works cycle in 2013–2014.

[17] Respondent's assignment of Brown and Saturno to teach at a Tryout in March 2014 does not preclude a finding that its failure to assign them to teach the shop and field classes in the 2013–2014 New Jersey Building Works cycle was motivated by animus against their protected concerted activity. Respondent assigned Brown and Saturno to teach the March 2014 Tryout after they filed their initial unfair labor practice charges in this matter, on January 28, 2014, and January 29, 2014, respectively (GC Exh. 1(a-d)).

4. Other evidence of animus and respondent's proferred reasons for the assignment of Instructor work during the 2013–2014 New Jersey Building Works cycle

The timing and sequence of events involved in Respondent's decision to assign Levisay and Russo to teach the shop and field class in the 2013–2014 New Jersey Building Works cycle in lieu of Brown and Saturno also indicate that Respondent was motivated by animus toward the latter's protected concerted activity. The evidence establishes that after their meeting on October 23, Staunton sent Brown and Saturno a detailed schedule for the upcoming New Jersey Building Works cycle, as was customary for the instructors prior to beginning a program in which they would be teaching. Two days later, Staunton emailed Brown and Saturno that "We look forward to another successful class," implying to them, given their past experience of teaching every class for which they had participated in the Tryouts, that they would be teaching it (GC Exh. 18). However, Levisay testified that sometime in November 2013, Staunton contacted him about teaching the field class, which indicates that Staunton had by then determined that Brown and Saturno would not be teaching in the upcoming New Jersey Building Works cycle (Tr. 136–138; GC Exh. 5).[18] Respondent's assignment of Levisay for the field class instead of Brown and Saturno thus took place within weeks of the October 23 meeting with Staunton during which they engaged in protected concerted activity. It is well-settled that adverse employment action occurring at a time proximate to an employee's protected activity constitutes evidence of unlawful motivation. See, e.g. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 14 (2012) (timing of employee discipline, less than 2 months after employer learned of protected activities and 2 weeks following union election, evinces unlawful motivation); *Sears Roebuck & Co*., 337 NLRB 443, 451 (2002) (timing of discharge, "several weeks" after employer learned of protected concerted activities, indicative of retaliatory motive). Furthermore, the single intervening event established by the record between Staunton's late October emails anticipating that Brown and Saturno would be teaching the shop and field classes and her November contact with Levisay—her interactions with Burett regarding Brown and Saturno's terms and conditions of employment—was engendered by Brown and Saturno's protected concerted activity. This sequence of events indicates that Respondent's failure to assign Brown and Saturno to teach the New Jersey shop and field classes was unlawfully motivated.

The evidence also establishes that in assigning Levisay and Russo to teach the shop and field portions of the New Jersey cycle, as opposed to Brown and Saturno, Respondent suddenly deviated from several long-established practices in its assignment of part-time instructors to Building Works programs, and its assignment of Brown and Saturno in particular. As discussed above, the evidence establishes that Brown and Saturno had taught the shop and field courses in both the New York and New Jersey Building Works cycles for approximately 13 years. As Killinger testified and as confirmed to some extent by Brown and Saturno's timesheets, the two had worked "side by side in the context of [the Building Works] program" for a number of years (Tr. 329). Brown and Saturno's uncontradicted testimony further establishes that every time they taught a Tryout for a Building Works cycle, they were assigned to teach in the cycle itself. Respondent's abrupt departure from these long-standing practices for the 2013–2014 New Jersey Building Works cycle is compelling evidence of unlawful motive absent

[18] Subsequently on December 2, Levisay emailed Staunton stating that he had heard a conversation between Brown and Saturno which indicated that he "would not be needed" for the field portion of the New Jersey cycle (GC Exh. 5, p. 1). In her response, Staunton stated that Respondent had selected Levisay for the field portion of the New Jersey cycle, in West Orange, and that one other instructor would also be teaching (GC Exh. 5, p. 2).

a persuasive and substantiated explanation. See, e.g. *Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at fn. 3, 15 (2014); *Relco Locomotives, Inc.*, 358 NLRB No. 37, at 14.

I find that Respondent has not offered cogent explications, supported by probative evidence, for its selection of Levisay and Russo in lieu of Brown and Saturno, or for the process by which it made its determinations. Respondent argues that the 2013–2014 New Jersey cycle was the first Building Works program that Staunton was responsible for staffing, and the evidence does not contradict this assertion. Respondent also contends that Staunton herself made the decision to assign Levisay and Russo, as opposed to Brown and Saturno, to teach the shop and field classes, without advice from other managers. However, the fact that the 2013–2014 New Jersey cycle was the first that Staunton staffed makes it more likely that Staunton would consult with other management, a number of whom had expressed dismay at Brown and Saturno's protected activity, regarding the assignment of instructors. Indeed, the evidence establishes, as discussed infra, that Staunton presented a draft of her email informing Saturno that he would not be assigned to teach during the New Jersey cycle to McNamara before finalizing and sending it to Saturno himself. In addition, I find it implausible that, in the context of Staunton's own lack of experience, she would assign instructors with substantially less experience to teach the first cycle for which she was responsible when Brown and Saturno were available. Indeed, the evidence establishes that weeks prior to assigning instructors for the New Jersey cycle, Staunton asked Brown and Saturno, and not Levisay, Russo, or any other instructor, for a detailed, day-to-day description of the shop class. Therefore, she was aware of, and actually sought to utilize, their superior knowledge and experience. If, as Respondent claims, the New Jersey cycle constituted her first assignment of instructors to a Building Works program, it simply does not make sense that Staunton would pass over the two instructors she had recently asked for a comprehensive description of one of the key components of that program in favor of instructors with significantly less experience. This raises the inference that her failure to assign Brown and Saturno was informed by the sentiments of other managers.

Respondent also contends that Staunton in making assignments was relying on an August 8 email sent to her by Killinger, which listed Building Works instructors as "interchangeable." However, the evidence overall does not support this characterization of the document's import. First of all, although Killinger's email states that "Per Elly [Spicer], full-time always gets the priority," Staunton assigned two part-time instructors, Levisay and Russo, to teach the New Jersey cycle, apparently disregarding that explicit instruction (R.S. Exh. 8). Furthermore, Brown and Saturno's names appear first and second under the heading of part-time instructors, with Russo's name third and Levisay's fifth. Therefore, to the extent that Staunton was seeking guidance in assigning instructors, Killinger's August 8 email does not elucidate her reasoning in the manner that Respondent asserts.

More probative in terms of guidance that Staunton received from other managers are her emails pertinent to informing Brown and Saturno that they would not be teaching the shop and field classes. The record establishes that 1 ½ hours prior to responding to Saturno's December 12 email inquiring about the New Jersey shop and field classes, Staunton drafted a response and sent it to McNamara (GC Exh. 24; R.S. Exh. 13). The wording of Staunton's later email to Saturno is slightly different (GC Exh. 24; R.S. Exh. 13). Although Staunton and McNamara both testified, with Staunton describing events occurring on December 12 itself, Respondent made no attempt to elucidate the details of the process reflected by the documentary evidence. This indicates that, contrary to McNamara's testimony, Staunton and McNamara discussed the fact that Saturno would not be teaching during the New Jersey cycle on at least one occasion (Tr. 356). It is also more plausible that, given that Staunton had only recently become grants

manager, she would be interested in consulting with other managers with a lengthier period of experience prior to passing over a long-time instructor, for the reasons discussed previously. And in fact, Staunton testified that she met with the program coordinators and McNamara on December 12 regarding the postponement of the New Jersey cycle, and that such scheduling issues would typically be discussed with Spicer (Tr. 267–269, 281–283). As a result, for all of the foregoing reasons the evidence strongly indicates that Staunton interacted with McNamara and Spicer—both of whom had expressed dissatisfaction with Brown and Saturno's protected concerted activity—regarding which instructors would be assigned to teach the shop and field classes for the 2013–2014 New Jersey Building Works cycle.

Furthermore, I find that Brown and Saturno were particularly relied upon as instructors in the Building Works program, despite Respondent's contention that there was no formal job title of "primary" or "lead" instructor. Although Killinger testified to this effect, a March 13 email he sent to Brown and Saturno regarding shop and field classes in April refers to an additional instructor as someone "to assist" with the field class, and solicits Brown and Saturno's input so that "any needed changes" can be implemented in advance of the class' inception (GC Exh. 9). On June 4, program manager Higbee directed Brown to "organize" with the other instructors "how many" Carpenter Awards would be given to students in a recently completed Building Works program, and which students would receive awards (GC Exh. 13). In addition, there is no evidence that when Brown referred to himself and Saturno as "primary instructors" in a February 5 e-mail to Higbee, any of Respondent's managers disputed this characterization (GC Exh. 12). Finally, as discussed above, Staunton approached Brown and Saturno, and not any of the other instructors, to prepare a detailed, comprehensive description of the shop class they taught during Building Works programs. Regardless of the formal job titles involved, there is no evidence that Levisay and Russo operated in any comparable capacity. Brown and Saturno's tenure and prominence as instructors therefore makes Staunton's selection of Levisay and Russo for the first Building Works cycle under her individual purview even more dubious, mitigating in favor of the conclusion that the decision was unlawfully motivated.

Furthermore, the reasons asserted by Respondent for Staunton's selection of Levisay and Russo for the shop and field classes of the New Jersey Building Works cycle are simply not supported by probative evidence. Respondent argues in its Post-Hearing Brief that Staunton assigned Levisay for the classes because Everett Kilgo, a program coordinator, informed her that Levisay had taught in New Jersey Building Works cycles in the past. (Posthearing brief for Respondent at 17, 25; Tr. 261). Respondent argues that there is no evidence that Kilgo exhibited any animus toward Brown and Saturno's protected activity, indicating that his recommendation of Levisay, ultimately effectuated by Staunton, was not unlawfully motivated. (Posthearing brief for Respondent at 25–26.)

This argument is not plausible for numerous reasons. First of all, Respondent did not call Kilgo as a witness to elucidate his recommendation of Levisay to Staunton, and did not explain its failure to present him. It is undisputed that Kilgo remains employed by Respondent, and while Respondent refused to stipulate that Kilgo is a supervisor within the meaning of Section 2(11) of the Act, there is significant evidence of supervisory authority,[19] and

[19] Brown and Saturno both testified that Kilgo had a lengthy tenure as a program manager with Building Works, and that they had daily contact with him while teaching in New Jersey regarding student performance, grades, and problems (Tr. 374, 378, 389–391). Staunton confirmed that Kilgo manages the day-to-day operations for the New Jersey Building Works program cycles (Tr. 240–241). Brown also testified that Kilgo created and approved forms for ordering supplies and materials, and on one occasion docked him 2 hours pay (Tr. 377–381).

Respondent's counsel described him as "on the cusp" of supervisory status (Tr. 360–361). In any event, given Staunton's testimony that she followed Kilgo's recommendation with respect to the assignment of Levisay in lieu of either Brown or Saturno, I find it appropriate to draw an adverse inference from Respondent's failure to call him as a witness. See, e.g., *Parksite Group*, 354 NLRB 801, 805–806 (2009).[20] I therefore find it appropriate to assume that had Kilgo testified, his testimony regarding the selection of Levisay instead of Brown or Saturno to teach the shop and field portions of the 2013–2014 New Jersey Building Works cycle would not have supported Respondent's assertions.

This is particularly the case given the questionable nature of Kilgo's alleged rationale for recommending Levisay, his work during New Jersey Building Works cycles. Staunton testified that Kilgo recommended Levisay because Levisay "was an instructor who they often worked with in the New Jersey training cycle" (Tr. 261). Similarly, Respondent stated in its first position paper submitted during the investigation that Levisay "was regularly assigned to Building Works New Jersey projects" (GC Exh. 25(a), p. 6). However, the documentary evidence establishes that Brown and Saturno both taught in New Jersey, and did so much more frequently than did Levisay.[21] Indeed, documentary evidence confirms Brown's testimony that 2 years earlier he had taught a shop class with Levisay at the very building site used for the 2013–2014 New Jersey Building Works field training[22] (Tr. 111–113; GC Exh. 7). Perhaps tellingly, in a second position statement submitted to the Region almost 6 months later, Respondent asserted that Levisay became involved in the 2013–2014 New Jersey Building Works cycle in the following manner:

> The field work was to be conducted at a West Orange, New Jersey site, and at that time Steve Levisay commuted through New Jersey. Because it was convenient for him, he was asked to visit and scout the suitability of the site for the Field Work class. Levisay was scheduled to be the Instructor for the Carpentry Shop Class and also to be one of the Field Work Instructors.

[20] In *Parksite Group*, the complaint alleged that the Respondent, a successor employer, unlawfully refused to hire its predecessor's employees in order to avoid an obligation to bargain, in violation of Sections 8(a)(5) and (3) of the Act. 354 NLRB at 804. Respondent's manager responsible for making all of the hiring determinations, Coulter, testified at the hearing that he declined to hire nine of the ten predecessor employees based on the recommendation of a local manager, LaRusso, who constituted the sole source of information regarding the predecessor employees' work performance. *Parksite Group*, 354 NLRB at 803–805. The Board held that in these circumstances the ALJ appropriately drew an adverse inference from Respondent's failure to call LaRusso, who remained employed by Respondent at the time of the hearing, to testify. *Parksite Group*, 354 NLRB at 803.

[21] Time sheets submitted by Brown, Saturno and Levisay support Brown and Saturno's testimony that they regularly taught shop and field classes during New Jersey Building Works cycles (GC Exhs. 7, 8, 22, 23, 26). They also establish that Brown and Saturno had taught during New Jersey cycles substantially more frequently than had Levisay (GC Exhs. 7, 8, 22, 23, 26; R.S. Exhs. 2–4). Finally, they confirm Brown, Saturno, and Levisay's testimony that Levisay and Russo almost always served as the third instructor in shop and field classes with Brown and Saturno (Tr. 201–202).

[22] According to Brown's uncontradicted testimony, Saturno did not teach this field class because he was teaching a blueprint reading course for a New York Building Works cycle at the time (Tr. 113).

(GC Exh. 25(b), p. 8.) Similarly, in his opening statement, Respondent's counsel stated that Staunton found the assignment of Levisay optimally efficient because he "lives in Pennsylvania and is a New Jersey local Union Carpenter and was identified with work in New Jersey" (Tr. 23). These shifting reasons for the assignment of Levisay to teach the shop and field classes in the 2013–2014 New Jersey Building Works cycle are in and of themselves evidence of unlawful motivation. See, e.g., *Airport 2000 Concessions, LLC*, 346 NLRB 958, 978 (2006) ("Shifting defenses have been long held by the Board to signify the proffered reason for an action is pretextual"); *Black Entertainment Television*, 324 NLRB 1161 (1997). Thus, their contradictory nature would have made Kilgo's testimony all the more critical, and their legally suspect character in the context of the *Wright Line* analysis confirms that drawing an adverse inference based upon Respondent's failure to present Kilgo's testimony is appropriate.

Respondent's evidence with respect to its selection of Russo is similarly problematic. In its opening statement and Posthearing brief, Respondent contends that Russo was assigned to teach the shop and field classes during the New Jersey Building Works cycle because he was already teaching the same group of students in safety and health class, and was therefore familiar with them (Tr. 23; GC Exh. 25(a), p. 6). Staunton was asked whether Russo had any involvement in the cycle other than teaching shop and field classes, and responded that he taught the OSHA 10 class (Tr. 262). Asked whether she spoke with Russo regarding teaching the shop or field classes, she stated that she had done so in December 2013 (Tr. 262). However, she provided no concrete reason during her testimony for having selected him for the shop and field classes in the New Jersey Building Works cycle. In addition, Brown and Saturno were also familiar with the group of students participating in the 2013–2014 New Jersey Building Works cycle from their teaching the Tryout; in fact, if Respondent's typical practices had been followed Brown and Saturno would have evaluated the candidates at the Tryout to determine which should be selected for the Building Works cycle itself (Tr. 216–217). The evidence also establishes that Saturno taught blueprint reading during the 2013–2014 New Jersey cycle, to the same group of students (Tr. 189; R.S. Exh. 12). As a result, there is little basis to conclude that Brown and Saturno lacked familiarity with the students as compared with Russo. Furthermore, the evidence establishes that in the past, Brown and Saturno had taught shop and field classes during cycles where Russo had previously taught health and safety to the same group of students. (GC Exh. 4, 7, 22). Respondent offered no reason for its deviation from this practice, either.

In addition, Respondent offered shifting defenses of its selection of Russo in its two position papers submitted to the Region. As discussed above, in its first position paper, Respondent contended that Russo was selected based upon his familiarity with the students in the 2013–2014 New Jersey Building Works cycle. In its second position paper, Respondent contended that Russo was selected for the shop class because when Respondent decided that a second shop instructor was needed Russo "had already been scheduled for the field work" (GC Exh. 25(b), p. 8). This assertion elides any rationale for having chosen Russo, as opposed to Brown or Saturno, for the field work in the first place, and is not persuasive. And, as discussed above, such shifting defenses constitute evidence of unlawful motivation.

For all of the foregoing reasons, General Counsel has established a prima facie case that Brown and Saturno were not assigned to teach the shop and field classes in the 2013-2014 New Jersey Building Works cycle in retaliation for their protected concerted activity. The evidence fails to substantiate the legitimate, nondiscriminatory reasons asserted by Respondent for its actions. As a result, the evidence establishes that Respondent's failure to assign Brown and Saturno to teach the shop and field classes in the 2013–2014 New Jersey Building Works cycle violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent New York City District Council of Carpenters Apprenticeship, Journeyman, Retraining, Educational, and Industry Fund is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By failing and refusing to assign Dennis Brown and Richard Saturno to teach the shop and field classes in the 2013–2014 New Jersey Building Works training cycle in retaliation for their protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

3. The above violation is an unfair labor practice affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in an unfair labor practice, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

The 2013–2014 New Jersey Building Works training cycle ended in January 2014. General Counsel therefore seeks a make-whole remedy, including backpay and daily compound interest, as well as a notice posting. I find this relief to be appropriate, and will order that Respondent make Brown and Saturno whole for any loss of earnings and other benefits suffered as a result of Respondent's discriminatory refusal to assign them to teach the shop and field classes of the 2013–2014 New Jersey Building Works training cycle. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I shall also order Respondent to compensate Brown and Saturno for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Respondent shall be required to remove from its files any and all references to its unlawful refusal to assign Brown and Saturno to teach the shop and field classes in the 2013–2014 New Jersey Building Works training cycle, and to notify Brown and Saturno that this has been done and that the refusal to assign them this work will not be used against them in any way.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[23]

[23] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

ORDER

The Respondent, New York City District Council of Carpenters Apprenticeship, Journeyman, Retraining, Educational, and Industry Fund, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing and failing to assign instructors to teach shop and field classes in its Building Works training cycles in retaliation for their protected concerted activities.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Dennis Brown and Richard Saturno for any loss of earnings and other benefits suffered as a result of the discriminatory refusal to assign them to teach the shop and field classes in the 2013–2014 New Jersey Building Works training cycle, in the manner set forth in the remedy section of this decision.

(b) Compensate Dennis Brown and Richard Saturno for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(c) Within 14 days from the date of this Order, remove from its files any and all references to its unlawful refusal to assign Dennis Brown and Richard Saturno to teach the shop and field classes in the 2013–2014 New Jersey Building Works training cycle, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful refusal to assign them this work will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post, at its facility in New York, New York, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all

[24] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by the Respondent at any time since January 15, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 30, 2015

_____
Lauren Esposito
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to assign instructors to teach shop and field classes in Building Works training cycles in retaliation for their protected concerted activities.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Dennis Brown and Richard Saturno for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL compensate Dennis Brown and Richard Saturno for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to assign Dennis Brown and Richard Saturno to teach the shop and field classes in the 2013–2014 New Jersey Building Works training cycle, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful refusal to assign them this work will not be used against them in any way.

NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS APPRENTICESHIP, JOURNEYMAN, RETRAINING, EDUCATIONAL, AND INDUSTRY FUND
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want

union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Suite 3614
New York, NY 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0346

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-120698 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0300.